Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

No. 92-1181

In The

Supreme Court of the United States

October Term, 1992

BARNEY L. BYRUM, *et al.*,

Petitioners,

vs.

BEAR INVESTMENT COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LAIR DAYTON HAUGH
Counsel of Record
CHARLES R. HAUGH
HAUGH & HAUGH, P.C.
Attorneys for Respondents
435 Park Street
Charlottesville, Virginia 22902
(804) 296-0185

3212
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

TABLE OF CONTENTS

	Page
Statement of the Case	1
Opinions Below	2
Statement of Facts	4
Summary of Argument	8
Reasons for Denying the Writ	9
I. The Circuit Court's decision was correct under the law and facts.	9
A. Summary Judgment Was Proper Under Federal Rule of Civil Procedure 56.	9
B. The Circuit Court's Decision Was Based on Virginia Law.	10
C. Federal Rule of Civil Procedure 8 Is Not Applicable to the Pleadings in this Case.	11
D. Byrum Is Not Entitled to a Trial by Jury.	12
E. Summary Judgment for Bear is Proper.	13
Conclusion	19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Barney L. Byrum et al., Appellees, v. Bear Investment Company et al., Appellants, 936 F.2d 173 (4th Cir. 1991) 3, 4, 10, 12, 15

Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245, 108 S.E. 15 (1921) 13

Pollar v. Columbia Broadcasting System, 368 U.S. 464 (1962) 13

Virginia Hardwood Lumber Co. v. Hughes, 140 Va. 249, 124 S.E. 283 (1924) 17

Rules Cited:

Federal Rules of Civil Procedure:

Rule 8 ..... 8, 11

Rule 8(c) 11

Rule 56 ..... 8, 9, 10, 13

Supreme Court Rules:

Rule 10 ..... 8, 10, 13, 19

Rule 10(1)(b) 10

Contents

Page

Rule 10(1)(c) 12

Rule 42(2) 19

Other Authority Cited:

Virginia Constitution, Article I, Section 11 13

APPENDIX

Appendix A — Excerpts: Byrums' Brief to Virginia Supreme Court 1a

Appendix B — Excerpts: Louisa Circuit Court Preceedings on February 15, 1984 ..... 4a

Appendix C — Excerpts: Louisa Circuit Court Proceedings on December 16, 1985 ..... 6a

Appendix D — Excerpts: Louisa Circuit Court Proceedings on April 14, 1986 ..... 9a

Appendix E — Notice Recorded by Byrum with Other Documents on January 18, 1984 ..... 15a

Appendix F — Letter: Dick to Whitlock Dated February 10, 1984 ..... 17a

Appendix G — Statement Withdrawing Allegations Prepared by Whitlock on February 15, 1984 ..... 19a

No. 92-1181

In The

Supreme Court of the United States

October Term, 1992

BARNEY L. BYRUM, *et al.*,

Petitioners,

vs.

BEAR INVESTMENT COMPANY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The issue before The Fourth Circuit Court of Appeals (hereinafter Circuit Court) was whether the parties subsequent to December 16, 1983, entered into a contract to settle the matter in controversy between them.

Petitioners' (hereinafter Byrum) Petition contains a great deal of matters not relevant to the issue before the Circuit Court or this

Court (*i.e.*, reasons why Byrums land was subjected to foreclosure found on page 8).

The Petition contains misstatements of fact, (*i.e.*, that Byrums previous attorney's legal fees were never to exceed $5,000, page 13 (*see* terms of security instrument Byrums' appendix, pages 130-131).

The Petition recites facts not in evidence (*i.e.*, that the Byrums put $8,000 in a shoe box to settle, page 14, and that the real estate is likely to have a value of over one million dollars, page 11).

Further, Byrum's statement is composed mostly of arguments and the allegations contained therein are not referenced to any authority or documentation.

OPINIONS BELOW

Byrum, *pro se*, on December 16, 1988, filed a five count complaint, later amended to add counsel, in the District Court for the Eastern District of Virginia, Richmond Division (hereinafter District Court) against appellees (hereinafter Bear) for breach of an alleged settlement contract seeking damages for breach thereof and specific performance (Byrum App. 67).

On June 15, 1989, after a June 7, 1989 hearing, the District Court granted Bears' Motion to Dismiss Counts 2, 3, 4, and 5 of the Amended Complaint, and denied the Motion as to Count One (Byrum App. 18).

On June 7, 1989, prior to the aforesaid hearing, Byrum filed a Motion For Summary Judgment as to Count 1 of the Amended Complaint, which count was grounded on simple breach of contract.

On June 28, 1989, without a hearing, the District Court, by Order and Memorandum Opinion, found that the parties had entered into a contract or agreement on December 16, 1983, and granted Byrums' Motion For Summary Judgment as to Count One.

Bear filed a Notice of Appeai to this Order and the Circuit Court, by opinion entered on June 20, 1991, in the case of *Barney L. Byrum et al., Appellees, v. Bear Investment Company et al., Appellants,* 936 F.2d 173 (4th Cir. 1991) (hereinafter *Byrum I*) reversed the District Court's Order and remanded the case to said District Court for further hearing to determine whether the parties entered into a contract or agreement subsequent to December 16, 1983 (Byrum App. 50). Byrum I is now final and binding between the parties.

Thereafter both parties filed Motions For Summary Judgment.

Byrum, in their Motion For Summary Judgment, alleged that a contract or agreement had been entered into between the parties when on January 9, 1984, they struck the words "under protest" from the check, and tendered the same to Bear, and when on January 18, 1984, they executed and recorded the release prepared by Bear on December 20, 1983.

Bear's Motion For Summary Judgment alleged that the parties never entered into a contract or agreement subsequent to December 16, 1983.

On December 3, 1991, the District Court, without a hearing, found that the parties entered into a contract or agreement subsequent to December 16, 1983, and not later than February 10, 1984, and entered an Order denying Bear's Motion For Summary Judgment and granting Byrum's Motion For Summary Judgment (Byrum App. 23).

Bear filed a Notice of Appeal to that Order and the Circuit Court, by unpublished opinion entered on August 10, 1992, (hereinafter *Byrum II*) reversed The District Court's Order and remanded the case to said District Court with instructions to enter Summary Judgment for Bear (Byrum App. 4).

STATEMENT OF FACTS

The parties hereto have been involved in litigation since 1979 over Bear's purchase of Byrum's Louisa County real estate at public auction foreclosure sale on November 19, 1979 (Byrum App. 55).

During the period from December 1983, through early 1984, Byrum and Bear, conducted settlement negotiations in an effort to resolve the matters in controversy. These negotiations were conducted through counsel, J. Benjamin Dick, hereinafter "Dick", for the Byrums, and W.W. Whitlock, hereinafter "Whitlock", for Bear.

On December 2, 1983, Whitlock wrote Dick setting forth certain proposals and conditions for settlement (Byrum App. 132).

Dick responded by letter dated December 16, 1983, enclosing a check and release, which check and release contained terms not in accordance with the terms of Whitlock's letter of December 2, 1983.

The Circuit Court in *Byrum I* found that no contract was formed on December 16, 1983, because Byrum's response of that date varied substantially from such offer (Byrum App. 54).

Whitlock responded to Dick's December 16, 1983, letter by letter dated December 20, 1983, rejecting Dick's tender; restating settlement terms, and, enclosing a form of general release that

Byrums were required to sign before the proposed settlement could be reached. Whitlock also returned Dick's check and release (Byrum App. 57).

On January 9, 1984, Dick and Whitlock again met, and according to Dick, Dick again tendered the original release, slightly amended (Byrum App. 127), and the original check with the words "under protest" stricken therefrom. At that time Dick made no response to Whitlock's letter of December 20, 1983 (Bear App. 3a).

The re-tender by Dick on January 9, 1984, was rejected by Whitlock who insisted that the terms set forth in his letter of December 20, 1983, including the execution by the Byrums of the release sent them on December 20, 1983, be complied with before any settlement could be reached (Bear App. 3a).

The purpose of the January 9, 1984 meeting was the presentation of a decree to the Louisa Circuit Judge for entry, which decree would direct conveyance of the land to Bear (Bear App. 7a).

The court, at that time, would not entertain talk of settlement but announced that it would continue the matter until January 18, 1984, at which time the court would enter the decree ordering conveyance of the land to Bear, unless there was presented to him by January 18, 1984, a settlement order endorsed by all counsel (Bear App. 8a, 10a).

On January 18, 1984, no court was held as scheduled and all counsel, except counsel for Byrum, were so notified (Bear App. 7a, 10a).

Dick and the Byrums traveled to Louisa on that day for the

purported entry hearing only to find that the scheduled hearing had been called off (Bear App. 7a, 10a).

Having been advised that unless a settlement was reached and a settlement order presented for entry on that day, the court would enter an order directing conveyance of the land to Bear which action would terminate any negotiations then being conducted for a dismissed-agreed settlement order, Byrum, without notice to or the knowledge of Bear or Whitlock, executed and recorded in the Louisa Circuit Court Clerk's Office the release required by Bear along with various and sundry other documents, (Bear App. 10a-13a), including a notice (Bear App. 15a) and the previous release prepared by Dick and rejected by Whitlock (Byrum App. 127).

The release executed on January 18, 1984 was never tendered to Bear and the fact of its recordation was unknown to Bear until some time thereafter (Bear App. 10a, 17a).

Further, no check was tendered to Bear on January 18, 1984 and no provision was made to tender the check to Bear in the future.

Dick on cross-examination, in the Circuit Court of Louisa County, explained why no provision was made for the payment of money on January 18, 1984.

> Q (By Whitlock) Well, you didn't leave any money with the clerk.
>
> A. You-we tendered the check to you two times and you returned it back two times.
>
> It's not my fault that you returned it back.
>
> Q. Why would you think it important to come down here and record this document without

making some arrangements about the money?

A. We'd given you a check twice, Mr. Whitlock, and you gave it back to us.

(Bear App. 8a).

Dick wrote Whitlock on February 10, 1984, informing him that the requested release had been executed and recorded even though doing that "offended" the Byrums greatly. Dick wrote that "the original is in my hands and I will file it with the court". Dick further wrote that "As I have tendered the $3,000.00 check twice and you have given back to me twice, I feel you do not want the money and I think your action to not take the money would be gracious. The Byrums certainly need the money far worse. . ." (Bear App. 18a).

Dick's letter did not inform Whitlock of the other instruments recorded on January 18, 1984 (Bear App. 17a-18a).

On February 15, 1984 the parties again met through counsel and continued negotiations.

Whitlock having become aware of the nature of the documents recorded by the Byrums on January 18, 1984, including the Notice (Bear App. 15a) expressing their feelings about settling the matters in controversy, added additional terms to Bears' settlement offer, including an apology in the form of a written "Statement Withdrawing Allegations" (Bear App. 19a-20a) which offer and terms the Byrums refused (Bear App. 2a).

Byrums never tendered payment of any amount to Bear after January 9, 1984, either by cash or check (Byrum App. 39).

SUMMARY OF ARGUMENT

The Order of the Circuit Court reversing the District Court's Summary Judgment Order in favor of Byrum and remanding the case to the District Court with instructions to enter Summary Judgment in favor of Bear should be upheld.

The issue decided by the Circuit Court was whether the parties after December 16, 1983, entered into a contract to settle a private matter in controversy between them.

Both parties filed Motions For Summary Judgment under Fed. R. Civ. P. 56 in the District Court because no genuine issue of fact was in dispute. All agreed that only a legal question remained to be decided by the courts.

Neither party objected to the court's deciding the issue on their Motions For Summary Judgment.

Byrum's complaint is not that the Circuit Court did not follow Fed. R. Civ. P. 56, only that Bear's Motion For Summary Judgment was granted.

During the course of these proceedings in the lower courts, Byrum never suggested that the court in deciding the issue was not following Virginia contract law; or, that they were entitled to a trial by jury on the issue; or, that Fed. R. Civ. P. 8 was applicable to the pleadings in this case.

The issue decided by the Circuit Court does not involve conflicting federal decisions, constitutional rights or matters of importance to the public generally as specified in Supreme Court Rule 10.

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT COURT'S DECISION WAS CORRECT UNDER THE LAW AND FACTS.

For purposes of argument, Byrums' question I and II have been combined and then broken down into subparts.

A. Summary Judgment Was Proper Under Federal Rule of Civil Procedure 56.

Rule 56 provides for Summary Judgment if the evidence shows "that there is no genuine issue as to any material fact in dispute and that the moving party is entitled to a judgment as a matter of law."

Here both parties filed Motions For Summary Judgment raising the question of whether after December 16, 1983, Byrum and Bear, through a series of negotiations, offers and counter-offers, ever entered into a contract to settle the matter in controversy between them.

Now, Byrum argues that there was a material issue of fact in dispute (Petition p. 33). The material fact in dispute, according to Byrum being "that the Byrums repeatedly tendered the money only to have it thrown in their faces" (Petition p. 30).

The actions of the parties subsequent to December 16, 1983, *viz.* Whitlock's letter to Dick dated December 20, 1983 (Byrum App. 154); Dick's oral response to Whitlock on January 9, 1984 (Bear App. 3a); Whitlock's response to Dick thereafter on January 9, 1984 (Bear App. 3a); Dick's actions and conduct on January 18, 1984 (Bear App. 10a-14a); Dick's letter to Whitlock dated

February 10, 1984 (Bear App. 17a); and, the actions and statements of Dick and Whitlock on February 15, 1984 (Bear App. 2a), are not in dispute.

The only matter in dispute is the legal effect of these communications and actions under Virginia Law.

Byrum, in its Petition, argues both sides of the question presented by arguing that the District Court followed Rule 56 (Petition p. 31) but that the Circuit Court did not (Petition p. 32).

Byrum is really only complaining about the result obtained in the Circuit Court and not that Rule 56 was not followed.

The Circuit Court followed federal procedure, rules and case law and there is no important or special reason for a review of that decision by this Court. Sup. Ct. R. 10.

B. The Circuit Court's Decision Was Based on Virginia Law.

The Virginia state law applicable to the formation of contracts is cited and quoted in *Byrum I*, 936 F.2d 173, 175 and referred to in *Byrum II* (Byrum App. 13).

Byrum's argument that in *Byrum I* the Circuit Court altered state law (Petition p. 33) is not only incorrect but ignores the fact that the opinion in *Byrum I*, entered on December 3, 1991, is a final and binding decision as to these parties and is the law of the case.

The decision of the Circuit Court was based on the facts and Virginia law of contracts and is a correct decision.

Accordingly, there is no reason for a review of that decision under Rule 10(l)(b) of the Supreme Court.

C. Federal Rule of Civil Procedure 8 Is Not Applicable to the Pleadings in this Case.

Rule 8(c) provides that in certain matters, including "payment" a party shall set forth such defense affirmatively in its pleading.

Byrum failed to raise this point in either the District Court or the Circuit Court prior to filing its motion to reconsider in the Circuit Court.

The issue raised in this case in the lower courts was whether, based on a series of offers and responses, a contract was entered into between the parties subsequent to December 16, 1983 (Byrum App. 7).

Bear has always maintained that no contract was entered into because Byrums never met any offer made by Bear while that offer was on the table (Byrum App. pp. 104-116).

One of the essential terms of each offer made by Bear involved the payment of a sum of money to Bear by Byrum, and one of the failures of Byrum to effectively accept Bear's various offers was their failure to tender such sum in accordance with Bear's then outstanding offer.

Byrum has misconstrued Rule 8 because this case was not a contract action for money that Bear could defend by pleading that payment had already been made.

This case has been through a hearing on a motion to strike in the District Court; two orders for summary judgment in the District Court; and, two hearings in the Circuit Court without any mention or objection by Byrum to Bear's failure to plead payment or non-payment under Rule 8, even if the Rule pertained to the facts of this case.

The decision of the Circuit Court is not in conflict with applicable decisions of this Court. Sup. Ct. R. 10(1)(c) .

D. Byrum Is Not Entitled to a Trial by Jury.

Byrum filed two Motions For Summary Judgment against Bear in the District Court and the District Court granted both motions.

The first Summary Judgment Order was reversed by the Circuit Court in *Byrum I.*

The second Summary Judgement Order was reversed in *Byrum II.*

No mention of, or claim to the right of trial by jury was raised by Byrum throughout any of the lower court's proceedings.

The question now raised by Byrum is whether a federal court, without violating either parties' right to trial by jury, has authority to grant Summary Judgment for one party in a case in which both parties moved for Summary Judgment on the same facts.

The issue between the parties and considered and determined by lower courts was whether after December 16, 1983, Byrum and Bear, through a series of negotiations, offers and counter-offers, ever entered into a contract to settle the matter in controversy between them.

Byrum has pointed out no fact in dispute. Both the District Court and the Circuit Court found and agreed that no material fact was in dispute.

Since there is no genuine issue of material fact in dispute the action of the lower courts in granting Summary Judgment under

Rule 56 does not violate Byrums right to trial by jury under the United States Constitution. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962).

The Virginia state constitutional provision for trial by jury is applicable only to state cases and Byrum instituted this action in the federal court.

In any event, Virginia state law is the same as federal law on this point and the grant of Summary Judgment does not violate Article I, Section 11 of the Virginia Constitution. *Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 108 S.E. 15 (1921).

There is no constitutional issue in this case to be reviewed by this Court under Rule 10 of the Supreme Court.

E. Summary Judgment for Bear is Proper.

As hereinbefore mentioned, the applicable Virginia law of contracts, offers, counter-offers and acceptances was applied by the Circuit Court on undisputed facts.

Bear's original offer terms set forth in the December 2, 1983 letter (Byrum App. 137) and rejected by Byrum's response of December 16, 1983, were restated and enlarged or altered in a new offer by Bear contained in its December 20, 1983 letter (Byrum App. 154).

Bear's new offer of December 20, 1983, consisted of the following terms:

1. Byrums were to select one of the 3 options set forth in the December 2, 1983 letter.

2. Submit that selection to Bear.

3. Byrums were to affirmatively indicate in some manner that they understood that Bear had done nothing to them and that Bear was engaging in this course of conduct to help the Byrums.

4. Byrums were to execute and tender the general release prepared by Whitlock and forwarded to them on December 20, 1983.

5. Byrums were to tender the sum of $3,000 by certified check without the words "under protest".

6. Byrums were to have no reservations about the settlement.

7. Byrums were not to attempt to settle with Bear under protest.

8. There were to be no further court hearings.

Byrum's first response to this offer of December 20, 1983, came on January 9, 1984, when they struck the words "under protest" from the $3,000 check and Dick tendered the check to Whitlock together with a release previously executed by the Byrums on December 13, 1983, and altered and initialed by them on January 9, 1984 (Byrum App. 127).

Except for the striking of the words "under protest" from the $3,000 check, the terms of Bear's offer, including execution of the release prepared by Whitlock that was sent to Dick on December 20, 1983 (Byrum App. 161), were intentionally ignored because Dick believed that "Mr. Whitlock would come around when we struck the words "under protest" on the check" (Bear App. 5a).

Under the law, Byrum's response of January 9, 1983, constituted a counter-offer and rejection of Bear's offer, which counter-offer was immediately rejected by Bear (Bear App. 3a), and the Circuit Court so found (Byrum App. 14).

Thereafter, on that same date, Bear again offered to settle with Byrum on or before January 18, 1984 in accordance with the terms set forth in Whitlock's letter of December 20, 1983 (Byrum App. 154), but Byrum failed to accept the terms thereof in the required manner (Byrum App. 15).

Byrum's first reaction or response to Bear's counter-offer of January 9, 1984, came on January 18, 1984, the date set for performance.

On that date, without Bear's knowledge or consent and without notice to Bear, Byrum executed the release prepared by Whitlock and recorded the same in the Louisa County Circuit Clerk's Office.

This release and other and sundry instruments were attached to and recorded with a Notice signed by Dick as counsel (Bear App. 15a-16a).

Among the documents recorded on January 18, 1984, was the release tendered to and rejected by Bear on January 9, 1984 (Byrum App. 127).

The notice, reciting that Byrums "submit to these demands to save their land and do so under force and pressure", and the two releases attached thereto strongly indicate a lack of acceptance by Byrum of the terms of Bears then existing offer.

The language of these documents are similar to the language disapproved by the Circuit Court in *Byrum I*.

No check was tendered to Bear on January 18, 1984 and no provision was made to tender the check to Bear in the future. (Bear App. 8a).

All parties to this action agree that unless Byrum accepted Bears' latest offer prior to January 18, 1984, the date set by the state court for further hearing, that the option under consideration was off and that Bear would go ahead and take title to the disputed land.

According to Whitlock, to consummate an agreement to settle in accordance with Option No. 1, the Byrums "had to execute the release I prepared, without it being under protest; it being a voluntary act on your part —accompanied by certified check of the amount you were to pay by January 18, 1984." (Bear App. 13a-14a).

Dick agreed, testifying that there would be no such agreement "unless we met your demands by January 18th —your new demands, and demands made after December 16th." (Bear App. 8a).

The Byrums' response on January 18, 1984, constituted a counter-offer to Bear and a rejection of the January 9, 1984, offer.

Byrums' second response to Bear's January 9, 1984 offer came on February 10, 1984, when Dick wrote Whitlock informing him that Byrums had executed his required release and had recorded the same on January 18, 1984, the original being "in my hands and I will file it with the court." (Bear App. 17a).

According to Dick's letter, the execution of that release by the Byrums "offended them greatly."

The original executed release was never tendered to Whitlock.

Dick's letter did not inform Whitlock of the other notices or documents recorded on January 18, 1984, which documents indicated again that Byrum's actions were not voluntary.

No money was tendered by Dick in his February 10, 1984 letter, and no promise was made therein to agree to pay the money or tender the same to Bear in the future.

On the contrary, Dick wrote:

> As I have tendered the $3,000.00 check twice and you have given back to me twice, I feel you do not want the money and I think your action to not take the money would be gracious. The Byrums certainly need the money far worse as they are over-ridden with many other financial and human hardships. . . .

(Bear App. 18a).

The law of Virginia is very definite and controls the parties' actions in this case.

In *Virginia Hardwood Lumber Co v. Hughes,* 140 Va. 249, 257, 124 S.E. 283 (1924), the Court wrote:

> The offerer has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters . . . ., and the acceptance must in every respect meet and correspond with the offer . . . exactly meeting them at all points and closing with these just as they stand . . . .

Dick's letter did not state or imply that Byrums accepted the terms of Bear's offer of January 9, 1984.

Byrums never performed the conditions set forth in any of Bear's offers, either before or after January 18, 1984.

Byrums never expressed or indicated a willingness to accept the terms of Bear's offer or to make tender in accordance therewith.

Dick's letter of February 10, 1984, constituted a counter-offer to Bear and a rejection of Bear's January 9, 1984, offer, if said offer had not been previously terminated by Byrum's actions on January 18, 1984.

As of February 10, 1984, no contract or agreement had been entered into between the parties.

Throughout their Petition, Byrum argues that tender and re-tender did occur in accordance with Mr. Whitlock's instruction (Petition p.43) but gives no details, sets forth no specifics, and cites no references in the evidence for such a statement.

In the lower courts Byrum argued that they accepted Bear's December 20, 1983 offer by tendering the check and the previously rejected release on January 9, 1984, and then recording the release prepared by Whitlock on January 18, 1984, but now argues (for the first time) that the Circuit Court "never conceded nor apparently understood that here a contract in settlement and compromise formed when the parties by written letters agreed to settle" (Petition p. 35).

No specifics are set forth and no references are cited to support the existence of a contract and Byrum does not and cannot point or refer to any act or document indicating a tender or willingness to tender the sum of $3,000 to Bear in response to Bear's January 9, 1984 offer nor to any act or document tending to contradict their failure and refusal to pay on January 18, 1984, and their failure and refusal to pay on February 10, 1984.

No contract was entered into between the parties and the judgment of the Circuit Court is absolutely correct.

The decision of the Circuit Court was based on Virginia contract law and involves a strictly private matter between the parties. Rule 10.

CONCLUSION

For reasons hereinbefore set forth Byrum's Petition for a Writ of Certiorari should be denied and Respondents should be awarded double damages pursuant to Rule 42(2) of the Supreme Court.

Respectfully submitted,

LAIR DAYTON HAUGH
Counsel of Record
CHARLES R. HAUGH
HAUGH & HAUGH, P.C.
Attorneys for Respondents
435 Park Street
Charlottesville, Virginia 22902
(804) 296-0185

APPENDIX A — EXCERPTS: BYRUMS' BRIEF TO VIRGINIA SUPREME COURT

IN THE
SUPREME COURT of VIRGINIA
AT RICHMOND

RECORD NO. 860977

BEAR INVESTMENT COMPANY,

Appellant,

v.

BARNEY L. BYRUM and ELIZABETH Y. BYRUM,

Appellees.

APPELLEE'S BRIEF

LAW OFFICE OF J. BENJAMIN DICK
J. BENJAMIN DICK, ESQUIRE
421 PARK STREET — SUITE 2
CHARLOTTESVILLE, VIRGINIA 22901

COUNSEL FOR APPELLEES

With the January 13, 1984 motion to enforce the settlement filed by the Byrums, the Byrums gave notice that they would seek to have the motion heard on January 18, 1984. On January 18, 1984 no one apeared at the Courthouse. The Byrums and their counsel *were not notified* that Court would not be held.

* * *

Appendix A

It is entirely incorrect that "the parties made a tentative oral agreement that day" ("that day" being February 15, 1984), to agree to sign the document titled "Statement Withdrawing Allegations" relating to multiple parties and other actions unrelated to the instant matter. Mr. Whitlock was asked on the record when he had his prepared release signed what else could he possibly demand next and he announced in recess he needed $5,000.00 and an apology. The Byrums had in hand the $3,000.00 cashier's check and by counsel stated to Mr. Whitlock that this newest demand of an apology after his release had been signed and recorded, which was the last demand, would have to been seen first. Mr. Whitlock, and this counsel adjourned to Mr. Arnold's office and Mr. Whitlock only and by himself dictated the "Statement Withdrawing Allegations". On seeing it, the Byrums announced there was no way they could sign a document as wrong as the one prepared by Mr. Whitlock for them to sign. On the same day it was never represented to Mr. Whitlock that the Byrums could not pay the agreed $3,000.00, the same having been tenered two or three times to him and refused and in hand. (This counsel saw the apology as tenable but the accelerating monetary demands as unconscionable holding literally the land as hostage.) The escalating monetary demands of Mr. Whitlock, this one on February 15, 1984 being $5,000.00, were never agreed to.

* * *

4) Bear Investment by written correspondence dated December 2, 1983 to Byrums' counsel, gave 3 options, the Byrums taking the 1st one (#1) that Bear Investment would agree to dismiss the case upon payment in cash or by certified check the sum of $3,000.00. In addition, a release would have to be executed to release Bear Investment Co., W.W. Whitlock, A.G. Johnson, and W.W. Whitlock from any

cause or claim. (Joint Appendix, Vol. II, pages 506-507.)

The Byrums on December 16, 1983 had delivered to W. W. Whitlock a cashier's check for $3,000.00 and a release. (Joint Appendix Vol. II, Page 523-524.) The release states "and as W. W. Whitlock, demands in said letter, we further agree to release from all claims only the following people and legal entities so described in W. W. Whitlock's letter, namely, W. W. Whitlock Agency, Inc., E. J. Whitlock, Jr., Robert A. Whitlock, A. G. Johnson, W. W. Whitlock and Bear Investment Company." (Executed 12-13-83.)

5) Not satisfied, Mr. Whitlock demanded the words "under protest" be deleted from the check and the release as requested by his letter of December 20, 1983 to the Byrums, page two, Joint Appendix, Vol, II, page 529. In that same letter, he encloses a release "that we have prepared" and he notes he is sending a copy of the letter to Mr. Arnold to advise him accordingly. (Trustee's Counsel.).

The Byrums there upon complied and struck the words "under protest" from the release and check and tendered the same again at a scheduled hearing on January 9, 1984 to Mr. Whitlock. Mr. Whitlock refused the same saying he wanted his release signed before he would settle.

APPENDIX B — EXCERPTS: LOUISA CIRCUIT COURT PRECEEDINGS ON FEBRUARY 15, 1984

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF LOUISA

Chancery # 2317

BARNEY L. BYRUM & ELIZABETH Y. BYRUM,

Plaintiff

V

GARY PATTERSON, TRUSTEE, ET AL,

Defendants

APPEARANCES:

J. Benjamin Dick, Esquire
421 Park Street
Charlottesville, Virginia 22902
Counel for Plaintiffs

Richard W. Arnold, Jr., Esquire
P.O. Box 276
Louisa, Virginia 23093
Counsel for Defendant Patterson

W.W. Whitlock, Esquire
P.O. Box 128
Mineral, Virginia 23117
Counsel for Defendant, BEAR Investment Company

Before: F. Ward Harkrader, Jr., Judge

* * *

[20] . . . And a far as this document that surfaced in January, I'd

like to speak to that in just a moment. But going on to Mr. Whitlock, and the 16th, I went to my clients and I told them what they had to have in this letter of December the 3rd, I believe it was, and they very reluctantly signed the Release, and language in there, was put in there at their request, and they issued a check from my Trust Account with the same sort of inscripion. Mr. Whitlock was not satisfied with it, as he said. He did call me. I wasn't there. We later discussed it. He was very unhappy with the "under protest" language and so the next thing we know — we had already been here December the 9th, in front of Judge Fry, where he refused to enter an Order confirming the sale or reinstating your June 5th Order. Then we came back here on January the 9th, in a — in a Jury Room back here. I told Mr. Whitlock, "What do you want?" and "Your letter says if we strike the words, "under protest" and on the check and on this Releae, that you'll — you'll be satisfied." [21] Not on the Release, if we strike it on the check and if they sign a second release document that Mr. Whitlock drew, that he likes, and which he didn't like mine, for all the reasons that he stated, he says it's a normal form release, and when Mr. and Mrs. Byrum read this clause that they were releasing — I'll read it to you — he says this — I don't know of any general form tht has this — now, however, tht we release all these people. He names everybody in the world, and he says, "upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents." Okay, well, that — that bothered the Byrums. They're educated people, but when we came to the 18th — when we came here the 9th, I had been here all morning with Mr. Arnold. We were in an amicable state of mind and I thought Mr. Whitlock would come around when we struck the words, "I under protest" on the check, and as things went in this case, they all fell for it, when I put it in my Motion about Richard being mute, . . .

* * *

APPENDIX C — EXCERPTS: LOUISA CIRCUIT COURT PROCEEDINGS ON DECEMBER 16, 1985

VIRGINIA: IN THE CIRCUIT COURT OF LOUISA COUNTY

Chancery Case Number 2319

BARNEY L. BYRUM, et al,

Plaintiffs

VS

GARY PATTERSON, Trustee, et als,

Defendants

APPEARANCES:

J. Benjamin Dick, Esquire
421 Park Street
Charlottesville, VA 22901
Counsel for Plaintiffs

Richard W. Arnold, Esquire
P.O. Box 276
Louisa, VA 23093
Counsel for Trustee,
Gary Patterson

W. W. Whitlock, Esquire
Post Office Box 128
Mineral, VA 23117
Counsel for Defendant
Bear Investment Company

C. Champion Bowles, Jr., Esquire
Main Street-Winston Building
Louisa, VA 23093
Counsel for Mr. Lowe

COURT PROCEEDINGS

TAKEN ON

December 16, 1985

Before: Honorable J. Henry Garnett, Judge Designate

Appendix C

* * *

[75] A That was entered by me as their counsel. We had appeared here on January 9th. The Court would not entertain, at Mr. Whitlock's request, any evidence of settlement, and the direction of the Court was that we should try to reach an order that everyone could sign by Janury 18th, and I came to the courthouse and no one was here. Judge Harkrader had fell and broken his leg. Mr. Agee was here. He had the office open. We had about 12 or 14 inches of snow, it was bitter cold, and since no one was here and the Court had indicated an order would be entered if we didn't reach Mr. Whitlock's demand of signing another release, I felt in their best interests and as their counsel I should record a notice and place it on the books.

* * *

[83] Q But you never delivered to me the release that I prepared, did you? A The lease was — I came here the 18th of January, had understood the Judge said we all had to be back here. No one was here. We recorded the release with the Clerk. Showed him your letter saying that this release had to be executed by the Byrums, and . . .

Q Why didn't you just give the release to the Clerk and tell him to give it to us, or why didn't you call my office? A I was here at court like I thought I was supposed to be. Nobody else was here, so I just gave to the Court — the Clerk so that there — there was notice . . .

Q You insisted that he record it, did you not? A Yes, I did.

Q Why did you want it recorded? A Because you wanted it signed and — and executed.

Appendix C

Q And did that mean it had to be recorded? A As you recall, Mr. Whitlock, Judge Harkrader said he would enter an order confirming the sale unless we met your demands and we met your demands on January 18th. Your new demands, and demands made after December 16th . . .

Q Well, you didn't leave any money with the Clerk. A You — we tendered the check to you two times and [84] you returned it back two times.

Q But why would you think . . . A It's not my fault that you returned it back.

Q Why would you think it important to come down here and record this document without making some arrangements about the money? A We'd given you a check twice, Mr. Whitlock, and you gave it back to us.

Q You'd also given me some release. A Well, we tried to — we tried to give you money several times and you keep handing it back to us.

Q Were the Byrums present when this document was prepared that was attached to the release and recorded? Did they take part in preparing and drawing that to, just like they did the release? A The notice?

Q Yes. A I prepared that by myself. Sat here and typed it on a typewriter.

* * *

APPENDIX D — EXCERPTS: LOUISA CIRCUIT COURT PROCEEDINGS ON APRIL 14, 1986

VIRGINIA: IN THE CIRCUIT COURT OF LOUISA COUNTY

Chancery Case Number 2319

BARNEY L. BYRUM, et al,

Plaintiffs

vs

GARY PATTERSON, Trustee, et als,

Defendants

APPEARANCES:

J. Benjamin Dick, Esquire
421 Park Street
Charlottesville, VA 22901
Counsel for Plaintiffs

Richard W. Arnold, Esquire
P.O. Box 276
Louisa, VA 23093
Counsel for Trustee
Gary Patterson

W. W. Whitlock, Esquire
P. O. Box 128
Mineral, VA 23117
Counsel for Defendant
Bear Investment Company

John Whitlock, Esquire
P. O. Box 128
Mineral, VA 23117

HEARING

Taken on April 14, 1986

BEFORE: Honorable J. Henry Garnett, Judge Designate

Appendix D

* * *

[27] . . . I don't remember the exact figures. Anyhow, Judge Hardrader thought we ought to try and settle it, and he gave us until January 18th to report to him whether or not there was an agreed settlement. And if there hadn't been an agreed settlement, he would enter the order that had been prepared to reinstate the previous ruling of the Court.

So we got down – I am not sure about dates – the date that we were supposed to appear here – I think it was the 18th of February, Judge Hardrader had an accident and fell and broke his leg. Court was called off. We were called and told not to come to court; that Judge Harkrader would not be here. We were not called and told that anybody would be here. I was in my office in Mineral. I didn't come to court because Court had been adjourned. Apparently Mr. Dick came here. I am not sure whether he came with his clients or not because there are some places in the record that say he did come with his clients and other places it appears to me that say he didn't. Anyhow without notice or knowledge to us, Mr. Dick came down here ap-[28]parently on that day and recorded this document, saying now that the reason he recorded it was because no one was here and he wanted to make certain that we were – we were put on notice that the Byrums had signed this release – the release that I had prepared.

But the first thing that was put on record was a letter on stationery of Bejamin Dick, signed by Bejamin Dick before a Notary, saying – says notice Elizabeth Y. Byrum and Barney L. Lyrum – and says, "Know all men who may inquire that the attached document directly pertains to land located in Louisa County, Virginia, acquired by the above purchasers from their successors - grant or their predecessors, grantors." Then it goes on

down and has this sentence in that statement, "The above submit to these demands to save their land and do so under the debt force and pressure; their land being a lifetime investment and a former creditor, John Lowe, Esquire, having been duly paid as demanded, to satisfy the Deed of Trust in bond of pain by him and a record in the Clerk's Office."

In addition to that statement, a letter from Mr. Arnold to Mr. Dick, telling him that your clients will not execute the release requested by Mr. Whitlock, and the release requested by Mr. Patterson, then it appears to me that the Judge will confirm sale of the property, so if your clients are willing to let this happen, please let me know so that the four thousand dollars ($4,000) being held in escrow by the Trustees [29] may be returned to your clients. That letter is dated January 12, 1984. All Trustee's fees and expenses of the Trustee in executing the trust will be taken out of the sales proceeds and the proceeds are paid into the trust – into the Trustee from the sale or Bear Investment Company, with the remainder of the funds to be sent to you, as attorney for Mr. and Mrs. Byrum. A copy of that went to Mr. Patterson.

THE COURT: Was that recorded?

A Yes. That was recorded as the second document in this series of papers. Then the third document recorded was the release – a similar release to the one that was sent to us, signed by the Byrums, saying that the undersign – Elizabeth and Barney L. Byrum, in consideration of the settlement suit of Byrum v. Patterson, Louisa County Chancery Number 2319 do hereby release from all claims, Gary B. Patterson, Trustee, and any person or persons employed by him in connection with this litigation, any heirs, assignees or administration of his estate whatsoever. It doesn't say anything in this one about them being forced to do it.

Appendix D

This is a reasonable release. It doesn't – then the next document is this release that I had prepared and outlines the provision that I included in my letter originally. This is shown to have been executed on January 19, 1984, the same day that these documents were recorded. We had no notice that this release had been signed. [30] We had no notice that was put on record. In fact the only way that we ever learned that all this mess was put on record was when Mr. Arnold happened to be checking the Deed Books in the Clerk's Office and read all of this business.

But in addition to this release being included in the documents, another statement was put in, said Notice and Affidavit. Know all ye that the annexed hereto recorded in the Clerk's Office of the Circuit Court of Louisa County, as it relates to the land of Elizabeth and Barney Byrum, located in Louisa County, a true and accurate copy of Elizabeth Byrum and Barney Byrum, execute a release in favor of W. W. Whitlock, Bear Investment Company and others. A receipt executed in favor of Elizabeth Byrum and Barney Byrum, by the former clients and office of John C. Lowe, and a copy of the cashier's check, front and back, represent cash money from the Byrums to the Trustee, Gary Patterson, for his expenses – and fees – as signed by J. Benjamin Dick, before a Notary.

And then in addition to the release that they recorded, that was the one we asked – they recorded the release that they had prepared that we said was not acceptable. And this is on page 567 of the same Deed Book, 272 - first one was recorded on page 561. And this again says, and this is the release that first said that they do under protest pay to the purchaser of the land, at the forced auction on November 19th. This has been marked out and the words, "Do agree under [31] protest" has been marked out and inserted above it – is added "are forced" – so that it read, this change was made on January 9, 1984 – so that it read then, "We are forced to pay the

purchaser of our land at the forced aution on November 19, 1979, so ordered by John Lowe and his fellow attorneys working for him" was still left in there.

This again, was an insulting statement to us because – a degrading statement to us and was not what we wanted or was appropriate to comply with our request for a settlement. We were given – I urged and pleaded with Bear Investment Company to give up their rights to this land, to try to make these people happy. And it was agreed by Bear Investment Company, that it would make them happy, if they will think that they haven't been done wrong and will know – see that we are trying to help them, then we will be willing to give it up; otherwise no reason to give up something that they had spent hours and a lot of money looking at it, determining whether or not it would be something they would be interested in buying, and then buying it and going through a lot of hassle connected with the buying of it.

But anyhow – then another document is the check showing that Mr. Patterson had cashed his four thousand dollar ($4,000) check. And on that check it shows that the words "Under Protest Payoff" was inserted and was still there apparently when the check was cashed.

* * *

[50] Q Was it not a fact that Judge Harkrader said by January 18th we had to come to an agreement with you, and your agreement was that we had to sign the release that you prepared by January 18th? A Our agreement was that you had to execute the release that I had prepared, without it being under protest, [51] it being a voluntary act on your part . . .

Appendix D

Q Okay . . . A And it had to be accompanied by certified check the amount of money tht you were supposed to pay.

Q Wasn't it executed on the 18th? A I find that you recorded it, along with other documents that I . . .

Q All right. You stated . . . A Wait a minute, let me finish, sir.

Q Yes, sir. A That I think put a cloud on the voluntary act of the release when you prefaced it with a statement, saying that you are doing it under force, and then showing another release that you have prepared, showing that that was done under force or under protest. If you wanted to record the release, that would have settled this case – although, I don't know why you wanted to record it – all you had to do was call me or come to my office and we could have cleared it out. But if you wanted to record it, you could have recorded the release that we sent and left the check with the Clerk or sent a check to our office to pay the money. You didn't do either of those.

* * *

APPENDIX E — NOTICE RECORDED BY BYRUM WITH OTHER DOCUMENTS ON JANUARY 18, 1984

BOOK 272 PAGE 581

J. BENJAMIN DICK
ATTORNEY AT LAW
421 PARK STREET
CHARLOTTESVILLE, VIRGINIA 22901
(804) 977-6607

[* Recorded January 18th 1984]

Nicholas P. Jellins, Esq.

NOTICE
(Elizabeth Y. Bryum and Barney L. Byrum)

KNOW ALL YE who may inquire that the attached documents directly pertain to land located in Louisa County, Virginia, Jackson Magisterial District acquired by the above purchasers from William Katsche and Mary C. Katschke, by instrument of deed dated October 2, 1956, Deed Book 96, Page 282, of the Clerk's Office of the Circuit Court of Louisa County, Virginia and that the documents annexed hereto arise from and out of demands made upon the above persons by written request of W. W. Whitlock Esq. personally and for others and by written request of R. W. Arnold, Esq. for Gary Patterson, Trustee, in order to prevent the transfer of the aforesaid land to Bear Investment Company by Court Order demanded by them and which transfer by Order of the Circuit Court was clearly indicated on the record would occur unless these demands of releases to gain the signature of W. W. Whitlock on a previously submitted Settlement Order endorsed by all counsel in the matter of Byrum v, Patterson et.al. save W. W. Whitlock submitted January 9, 1984 in open Court. The above submit to these demands to save their land and do so

under that force and pressure, their land being a lifetime investment and a former creditor, John C. Lowe, Esq. having been duly paid as demanded to satisfy the deed of trust and bond obtained by him and of record in the said Clerk's Office.

s/ J. Benjamin Dick
Of Counsel

STATE OF VIRGINIA
AT LARGE, to-wit:

Subscribed, sworn and acknowledged before me this 18th day of January, 1984 by J. Benjamin Dick.

My commission expires: February 21, 1987.

APPENDIX F — LETTER: DICK TO WHITLOCK DATED FEBRUARY 10, 1984

J. BENJAMIN DICK
ATTORNEY AT LAW
421 PARK STREET
CHARLOTTESVILLE, VIRGINIA 22901
(804) 977-6607

Nicholas P. Jellins, Esq.

February 10, 1984

CERTIFIED MAIL
P14 8108376

W.W. Whitlock, Esq.
Attorney at Law
Post Office Box 128
Mineral, VA 23117

Dear Mr. Whitlock:

Enclosed is a true copy of the Release duly recorded and executed January 18, 1984, that you demanded be executed before a Notary Public. This was done January 18, 1984, the date scheduled for a hearing. The original is in my hands and I will file it with the Court.

As a lawyer, I think you have a certain duty to endorse the Order signed by all other counsel and moreso due the fact that your demanded release is executed. Mr. and Mrs. Byrum have given you every demand, particularly this second demanded release drawn by your own hand that offended them greatly. To save their land, they signed it.

Appendix F

As I have tendered the $3,000.00 check twice and you have given it back to me twice, I feel you do not want the money and I think your action to not take the money would be gracious. The Byrums certainly need the money far worse as they are over-ridden with many other financial and human hardships that this matter has not helped at all and if anything has greatly increased their distress.

You wanted the release you drew, you have it. Please allow these poor people to go on, let the land alone, and if there is any divine justice, a day of reckoning shall be their only reprieve to the considerable unfortunate, mental stress, and harm that they have bravely endured in this matter through the years and more recently.

Enclosed is my letter to Judge Harkraker whom I have implored to end this matter if you can not make the trip to the Clerk's Office and sign your endorsement to the Order that all other counsel have signed before February 15, 1984. Please advise me if you do finally endorse the Order that is lodged with the record in the Clerk's Office.

I thank you and request your prompt professional attention and human empathy to end this matter.

Respectfully,

s/ J. Benjamin Dick

J. Benjamin Dick
Of Counsel

APPENDIX G — STATEMENT WITHDRAWING ALLEGATIONS PREPARED BY WHITLOCK ON FEBRUARY 15, 1984

VIRGINIA:

IN THE CIRCUIT COURT OF LOUISA COUNTY

Chancery No. 2319

BARNEY L. BYRUM, ELIZABETH Y. BYRUM,

Plaintiffs

vs.

GARY B. PATTERSON, Trustee, et als,

Defendants

STATEMENT WITHDRAWING ALLEGATIONS

WHEREAS the plaintiffs have filed documents in the clerk's office of the Circuit Court of Louisa County in Deed Book 272, Page 561 and along with other documents containing allegations involving this litigation, and

Whereas, Plaintiffs have given further considerattion to their allegations stated in said documents, and now by their own voluntary acts and at their own request do hereby make the following statement.

We acknowledge that the allegations made in the documents recorded in said clerk's office, other than the general release,

Appendix G

contain allegations that were untrue and we now wish to withdraw all of said allegations and we further wish to withdraw a motion filed on our behalf in this suit headed "Amended Motion to Enforce Settlement", and we hereby apologize to Richard W. Arnold, Jr., Gary B. Patterson, W. W. Whitlock, A. G. Johnson, Robert A. Whitlock, E. J. Whitlock, Jr., and W. W. Whitlock Agency Inc. and all parties connected therewith for allegations we have made in these proceedings and in other law suits filed in the City of Charlottesville, we now understanding that such allegations are untrue and incorrect.

We make this statement voluntarily and understand that we are not required to make this statement other than as our own desire.

We further will cause this document to be recorded in the clerk's office of Louisa County as in evidence of the cancellation of the previous notice and statements recorded in said clerk's office.

Given under our hand this 15th day of February, 1984.

_____

ELIZABETH L. BYRUM

_____

BARNEY Y. BYRUM

Appendix G

STATE OF

CITY/COUNTY OF _____, TO-WIT:

I, _____, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that

_____

whose names are signed to the above writing, have this day personally appeared before me and acknowledged the same in my jurisdiction as aforesaid.

My commission expires: _____.

Given under may hand this _____ day of _____, 198 .

_____
Notary Public